UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

GEORGE B. BARBEE, JR.

Debtor

No. 98-10072
Chapter 13

MEMORANDUM

Appearances: Robert J. Harriss, Harriss, Hartman, Aaron, Wharton, Boyd & Secord, Rossville, Georgia, Attorney for Debtor

Gary Lester, Mayfield & Lester, Chattanooga, Tennessee, Attorney for Blazer Financial

Carol Carter, Office of the Chapter 13 Trustee, Chattanooga, Tennessee, Attorney for C. Kenneth Still

HONORABLE R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

The Chapter 13 trustee and a creditor, Blazer Financial ("Blazer"), have filed objections to the Debtor's proposed Chapter 13 plan. The Chapter 13 plan treats the claim of Blazer as a general (non-priority) unsecured claim and proposes to pay it 100%. Blazer objected to confirmation on several grounds, but the objection is based almost entirely on Blazer's contention that its claim is secured. 11 U.S.C. § 1325(a)(5).

Though the plan proposes 100% payment to Blazer, the class of general unsecured claims will receive the remainder of the money paid into the plan after payment of secured claims, priority claims, and Blazer. This may result in a much less than 100% payment on the general unsecured claims. The Chapter 13 trustee contends that Blazer has only a general unsecured claim. Therefore the trustee objected to confirmation on the ground that the plan's classification of Blazer's claim for 100% payment unfairly discriminates against the other general unsecured claims. 11 U.S.C. § 1322(b)(1).

The court finds the facts as follows.

The Debtor and his wife, Teena Barbee, were divorced by a decree entered on February 18, 1997, by the Superior Court for Walker County, Georgia. Before the divorce decree was entered, the Debtor and his wife had executed a Compromise Agreement regarding child custody, child support, division of their debts, and division of their property. They signed the Compromise Agreement on December 31, 1996. It provided that it would be incorporated in to the divorce decree, and the divorce decree did incorporate it.

The Compromise Agreement made the Debtor's former wife the sole owner of personal property "presently" in her possession. It made the Debtor the sole owner of personal property "presently" in his possession.

The property in her possession included at least some furniture purchased from Kinder's Furniture Mall. The Debtor bought the furniture in January 1996 and March 1997. Each time he financed the purchase. He executed a note and security agreement, giving the seller a security interest in the furniture to secure repayment of the debt. Blazer now holds the notes and security agreements.

The March 1997 purchase occurred after entry of the divorce decree on February 18, 1997. The invoice, however, gives the former marital home as the debtor's address.

The Debtor financed about $2,600 on the first purchase and about $3,600 on the second purchase. The documents do not set out a fixed monthly payment on either purchase. They do provide a minimum monthly payment of 1/36th of the new balance if it exceeds $720. There was, however, a beginning period during which the Debtor was allowed to make smaller minimum payments or no payments ("Make no payments until . . . !").

The Compromise Agreement made the Debtor responsible for the Furniture Payment, which it listed as about $125 per month.

The Debtor scheduled only two secured debts, a mortgage debt and an arrearage on the mortgage debt. The mortgage is held by Mr. and Mrs. J. V. Stone. The property subject to the mortgage is a house and land located on Dry Valley Road. The Debtor gave the same address as his home address.

The Debtor's Chapter 13 plan proposes payments to the Chapter 13 trustee of $176 per week for 60 months. The plan proposes to pay the regular monthly mortgage payment of $355.84 and to cure the mortgage arrearage at the rate of $100 per month. The mortgage holders filed an arrearage claim for almost $3,000.

The plan provides for payment of the debt to Blazer in full. The plan states that there is a co-maker on the debt. Blazer has filed two claims, one for $1,590 and another for $4,136.70.

As to general unsecured claims, the plan provides that they will receive pro rata payments from the remainder of the money paid into the plan. This means the remainder after payment of administrative expenses, other priority claims, the mortgage arrearage, the monthly mortgage payments, and full payment of the debt to Blazer. The plan duration as proposed by the Debtor is 60 months.

Blazer's Objection to Confirmation

With regard to a division of property, the compromise agreement is essentially a contract between the Debtor and his former wife. *Hortman v. Childress*, 162 Ga. App. 536, 292 S.E.2d 200 (1982); *see also Head v. Hook*, 248 Ga. 818, 285 S.E.2d

718 (1982); *Ward v. Ward*, 236 Ga. 860, 226 S.E.2d 52 (1976); *Hudson v. Hudson*, 220 Ga. 730, 141 S.E.2d 453 (1965).

The terms of the agreement determine the effective date of a transfer made by the agreement. *Rickettson v. Metts*, 173 Ga. App. 606, 327 S.E.2d 570 (1985). Blazer's security interest did not prevent the Debtor from transferring his entire interest in the furniture to his former wife. *Ga. Code Ann*. 11-9-311.

The compromise agreement made the furniture bought in 1996 the sole property of the Debtor's former wife and deprived the Debtor of any interest in it. Though the compromise agreement does not clearly state an effective date, it was executed in contemplation of the divorce and it provided that it would be incorporated into the divorce decree. It was incorporated into the divorce decree. From these facts, the court concludes that the Compromise Agreement became effective no later than the date the divorce decree was entered. That occurred in February 1997, almost a year before the Debtor filed his Chapter 13 case.

Section 506(a) of the Bankruptcy Code provides that a creditor has an allowed secured claim to the extent of the bankruptcy estate's interest in the debtor's interest in the property. 11 U.S.C. § 506(a). Since the Debtor had no interest in the furniture when he filed his Chapter 13 case, the bankruptcy estate has no interest in the furniture. It follows that this furniture does not give Blazer an allowed secured claim. *In re Pardue*, 143 B.R. 434 (Bankr. E. D. Tex. 1992); *In re Whitelock*, 122 B.R. 582 (Bankr. D. Utah 1990).

The facts are less clear as to the furniture the Debtor bought in March 1997. The compromise agreement made the Debtor's ex-wife the owner of the furniture "presently" in her possession either in December 1996 when the compromise agreement was executed or in February 1997 when the decree was entered. "Presently" in this usage appears to mean the furniture then in her possession, not furniture that might be bought at a later time and delivered to her. Thus, the compromise agreement apparently did not make the Debtor's former wife the sole owner of the furniture bought in March 1997.

The invoice indicates that even though they were already divorced, the Debtor bought the furniture for his former wife's home, since that address was given. The Debtor and his former wife may have intended the furniture to be hers even if the divorce decree and Compromise Agreement did not clearly make it hers. A different agreement between them could have made the furniture hers. *Albert v. Albert*, 164 Ga. App. 783, 298 S.E.2d 612 (1982). The court, however, has no proof of such agreement. Thus, based on the evidence now before the court, it must conclude that the Debtor has an interest in this furniture, and therefore Blazer may have an allowed secured claim secured by the furniture bought in March 1997.

The Chapter 13 plan simply provides for payment of 100% of Blazer's claims. This may be better treatment than Blazer's claim would be entitled to as an allowed secured claim. Or, it may be worse treatment. The answer depends on the value of the collateral compared to the amount of the secured debt. 11 U.S.C. §§ 1325(a)(4) & 506. There is no evidence before the court as to the value of the furniture. The answer also

depends on whether the collateral for each debt secures both debts. If so, then the furniture bought in March 1997 may secure both debts. The parties have not addressed this question. The result is that the court can not confirm the plan. The court will allow the debtor ten (10) days to file an amended plan; otherwise, the case will be dismissed, there being no confirmable plan before the court.

In light of the decision regarding Blazer's claims, the court need not deal with the trustee's objection to confirmation, at this time.

The court will enter an order.

This Memorandum constitutes findings of fact and conclusions of law as required by Fed. R. Bankr. P. 7052.

BY THE COURT

entered April 23, 1998

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF TENNESSEE

In re:

No. 98-10072
Chapter 13

GEORGE B. BARBEE, JR.

Debtor

ORDER

For the reasons stated in the court's Memorandum Opinion entered this date,

It is ORDERED that the debtor(s) shall have ten (10) days from the entry of this order to filed an amended plan;

It is further ORDERED that if an amended plan is not filed within the time allowed, the case shall be dismissed without further hearing, there being no confirmable plan before the court. 11 U.S.C. §1307(c)(5); and

It is further ORDERED that the trustee's objection to confirmation is DENIED without prejudice.

ENTER:

BY THE COURT

entered April 23, 1998

R. THOMAS STINNETT
U.S. BANKRUPTCY JUDGE